Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council	)	MB Docket No. 17-91

COMMENTS OF THE NATIONAL APARTMENT ASSOCIATION

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The National Apartment Association hereby submits these comments in support of the above-captioned petition (the "Petition").

The National Apartment Association ("NAA") is America's leading voice for the apartment housing industry. NAA provides its members with the best range of strategic, educational, operational, networking and advocacy resources they need to learn, to lead and to succeed. As a federation of nearly 170 state and local affiliates, NAA encompasses over 72,000 members representing more than 8.8 million apartment homes globally.

I. Introduction and Summary

ARTICLE 52 is the intervention of a local government, with no prior expert policy experience or function, into the interstate information and telecommunications marketplace in the city of San Francisco. ARTICLE 52 would appear pro-consumer, and designed with a focus on protecting the single "occupant, as it is titled "Occupant's Right to Choose a Communications Service Provider." In reality, ARTICLE 52 is anti-consumer. It eliminates the consumer benefits that result when the building owner negotiates the terms and conditions of building access with the service providers on behalf of the tenants– a function that shifts the balance of negotiation power from the service provider to the consumer. Further tilting the balance away from the consumer, ARTICLE 52 allows service providers to demand access to scarce building space,

thus precluding other providers from using that space. ARTICLE 52 does not require the service provider who takes this space to provide any services attractive to building residents generally. The service provider gets into the building as long as a single "occupant" expresses an interest in whatever service the provider may offer, if any, as there is no requirement to even provide a service to occupy the scarce space of buildings. In fact, ARTICLE 52 serves no need, as apartment building owners in San Francisco are already focused upon fomenting competition in the offer of communications services to their tenants. Accordingly, ARTICLE 52 will interfere with the ability of consumers to obtain desired telecommunication, video and information services at reasonable rates. ARTICLE 52 should be preempted.

II. In Creating the Cable Inside Wiring Rules, the Commission Recognized the Important Consumer Protection Role Served by the Apartment Building Owners

ARTICLE 52 interferes with the existing Commission-studied and -endorsed system for ensuring that tenants enjoy quality communications services. The Commission's Cable Inside Wiring Rules[1] grant the building resident control of just the "home wiring," which is generally (subject to the sheetrock rule) the wiring within a single apartment unit and a 12-inch lead from that unit.[2] Other cable wiring left in the building after the service provider leaves the premises becomes the property of the building owner. In creating the Cable Inside Wiring Rules, the Commission recognized the important role played by the building owner in contracting with service providers, and thus struck a careful balance between the tenant's desire for services and the building owner's rights and functions by leaving the building owner with control over service provider access to the building and all wiring installed in the premises (other than home wiring).

[1] 47 CFR §§ 76.800 – 76.806.

[2] "Cable home wiring" and "Demarcation point" are defined in FCC Rule 76.5(ll) and (mm).

In making this decision, the Commission found that "MVPDs competing for the right to serve the building generally will have to offer the mix of video service quality, quantity and price that will best help the MDU owner compete in the marketplace."[3] The Commission has analyzed video service competition within MDUs and has concluded that MDU owners are incented to select service providers who are responsive to tenants' needs: "We believe that market forces will, in most cases, provide incentives for MDU owners to recognize tenants' interests in selecting a provider."[4] The Commission found further that:

> The record contains no evidence that the decisions MDU owners make with regard to video providers are depriving their tenants of diverse sources of information. The Commission concluded in the *Report and Order* that the property owner should have the ability to control the wiring because the property owner is responsible for the common areas of a building. Property owners have safety and security responsibilities, maintain compliance with building and electrical codes, maintain the aesthetics of the building, and balance the concerns of the residents. Individual subscribers will not be disadvantaged by having the MDU owner own or control the home run wiring. Considerations of fairness and efficiency persuade us to leave this aspect of our rules intact, rather than adopting the petitioner's proposals.[5]

In the Commission's view, leaving the wiring in the control of the building owner (i.e., the building-by-building disposition procedures) would:

> enhance competition by facilitating competitive entry in the MDU market, including where the market could only support another competitor that serves the entire building...[and]... facilitate switching to alternative MVPDs because they provide MDU owners with flexibility in determining the best way in which to offer their residents video programming services and thereby make their buildings more attractive to prospective residents."[6]

Apartment building owners compete vigorously for tenants and do this in part by offering quality amenities, such as ensuring access to high quality and reasonably priced communications

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[3] *Telecommunications Services Inside Wiring – Customer Premises Equipment*, CS Docket No. 95-184, FCC 03-9, at ¶ 11 (rel. Jan 29, 2003) (footnotes omitted) (paraphrasing comment).
[4] *Id.* at ¶ 15.
[5] *Id.* at ¶ 15 (footnotes omitted).
[6] *Id.* at ¶ 12 (footnotes omitted).

services, and otherwise controlling the tenant experience, in very competitive markets where buildings often are distinguished by the types and qualities of the amenities they offer the renter.

III. The Commission Has Studied and Rejected Proposals to Give Service Providers a Mandatory Access Right and Has Found that Mandatory Access Statutes Hinder the Delivery of Consumer Responsive Services

In the Cable Inside Wiring proceeding, the Commission was asked by service providers to give them mandatory building access rights, and the Commission rejected that request and criticized mandatory access laws:[7]

> The Commission has long recognized the anti-competitive effects of such discriminatory mandatory access statutes. In 1990, for example, the Commission stated that "discriminatory local mandatory access laws can operate to hinder the growth of alternative distribution services." More recently, in the *Report and Order*, the Commission acknowledged its concern about "disparate regulation of MVPDs that unfairly skews competition in the multichannel video programming marketplace."[8]

IV. ARTICLE 52 Is a Mandatory Access Law that Is Disguised as "Pro Tenant," Yet Helps Service Providers at the Expense of Tenants

ARTICLE 52 is a mandatory access ordinance that runs contrary to the Commission's findings in its Cable Inside Wiring proceeding and eschews the benefits of building owner selection of amenities to allow an unprecedented invasion of private space and access to tenants contrary to the building owner's wishes and without regard to the needs and desires of the tenants. Unlike the Commission's Cable Inside Wiring Rules, ARTICLE 52 mandates that building owners grant any and all service providers access to the wiring owned by the building and, in addition, to areas of the building used to install processing, amplification and other active and passive equipment, including risers, conduit, equipment rooms and other space.[9]

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[7] 62 Fed. Reg. 61016, 61025 (Nov. 14, 1997).

[8] *Id.* at ¶ 36 (footnotes omitted).

[9] Under ARTICLE 52, if the apartment building seeks to provide services itself, it cannot because any "communications service provider," which typically an apartment building would not be, has the right of access to this wiring and take it from the building owner, thus disrupting existing service. Section 5201(a) provides that "no property owner shall interfere with the right of an occupant to obtain communications services from the communications provider of the occupant's choice" and that interference includes "refusing to allow a

A. Building Owners Are Removed from Their Traditional Role as Protectors of Tenants, to Allow Service Providers to Gain Access to Buildings and Tenants While Undertaking No Service Obligations

Under ARTICLE 52, a building owner has no choice in who may act as service provider on the premises, no choice in what services these providers must provide to satisfy tenant needs and no say in the quality and price of these services. If fact, a service provider has a right of mandatory building access if it finds just one "occupant" to express an interest in taking any one service of *any* type – the service need not include the Internet access, VoIP and cable services tenants want and expect. ARTICLE 52 enables that outcome by providing that the definition of "communications services" for which access must be granted is any service the provider wants to offer.[10] The building owner can impose "reasonable" conditions on access by a provider but only to the extent "necessary to protect the safety, functioning, and appearance of the property and the convenience and well-being of the occupants when inspecting, installing, operating, maintaining, or removing its facilities and equipment from the property."[11] Missing from that list of acceptable access conditions is the character and reputation of a proposed service provider and its services. Thus, the apartment building owner must devote its space and its wiring to any

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communications services provider to install facilities and equipment necessary to provide communications services or use any existing wiring to provide communications services...." Section 5200 defines "communications services provider" as an entity that "(a) has obtained a franchise to provide video service from the California Public Utility Commission under California Public Utilities Code § 5840; (b) has obtained a certificate of public convenience and necessity from the California Public Utility Commission under California Public Utilities Code § 1001 to provide telecommunications services; or (c) is a telephone corporation as that term is defined in California Public Utilities Code § 234. In addition, a communications services provider must have obtained a Utility Conditions Permit from the City under Administrative Code Section 11.9." Clearly a building owner would not have either a cable franchise, certificate of public convenience and necessity or telephone corporation status, even if it sought to serve its own building (it would not cross public rights-of-way and thus would not be offering a "video service" as defined in Section 5830(s) of the California Public Utilities Code that would need to be offered under a franchise under the provisions of Section 5840 of that Code). Thus, under ARTICLE 52, the building owner's rights use its own wiring, and to space the building owner uses for its own communications services, is trumped by entities who qualify as "communications services providers."

[10] The definition in Section 5200 states, in part, that: "Nothing in this definition is intended to limit the types of services that a communications services provider accessing a multiple occupancy building pursuant to this Article 52 may provide to occupants."

[11] Section 5207(a).

and all service providers desiring entry, even if a service provider provides poor, substandard service and has a bad reputation, has a history of ignoring its responsibilities, is litigious or is someone with whom the building owner would not normally do business. Under ARTICLE 52, even a provider who has Better Business Bureau rating of "F" has a right to enter the premises.[12]

Tenants have come to expect that building owners will assure that high quality and fairly priced cable and Internet services are available to tenants. But, this role is eliminated because none of the list of acceptable conditions in ARTICLE 52 includes conditions designed to assure residents receive a range of services of expected quality and prices. By taking the building owner out of this quality-assurance role, tenants will suffer and building owners will suffer as the reputation of the building is degraded by substandard, generally undesirable and overly expensive service offerings.

If an apartment building owner wants a service provider to offer a robust video platform, the owner is free to make that offering a requirement for a service provider to serve the building – except in San Francisco. Or, if the building owner wants the service provider to offer its services at market or discount-to-market rates as a condition to serving the building, the owner is free to make offering those rates a requirement – except in San Francisco. Or, if a building owner wants the service provider to offer, for example, the safety and assurance of alarm service as an additional service available to tenants, the owner is free to make that offering a requirement - except in San Francisco. Or, if the building owner desires that the service provider include an Internet-of-Things offering as an amenity, the owner is free to make that offering a requirement - except in San Francisco. None of these consumer protection conditions, which are common, is permissible under ARTICLE 52.

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[12] The Better Business Bureau assigns ratings from A+ (highest) to F (lowest). This rating system is explained at: http://www.bbb.org/council/overview-of-bbb-grade/.

B. ARTICLE 52 Allows Service Providers to Appropriate Building Space with the Result that Services the Tenants Desire May Be Rendered Unavailable

Apartment building owners make money by the square foot and, accordingly, they design and construct buildings to make the most efficient use of available space. These purpose-built structures do not have a surfeit of equipment rooms or other spare space to house all of the active and passive equipment, including amplifiers, processing equipment, racks, generators, monitors, modems, channel banks, air conditioners and whatever other equipment the service provider or providers want to house at the building. Similarly, riser and conduit space is often limited. Thus, the number of service providers that can be accommodated is limited by space. This is especially true for older buildings that cannot accommodate more than a single provider without expensive modifications that will dissuade the second provider from allocating its resources to the building. This is but another reason why it is important for the building owner to have control over who provides these services in the building, and over the quality and pricing of the service offerings, which are otherwise unregulated.[13] The last thing a building owner wants is a set of service providers who collectively consume available space but do not actively market fairly-priced services tailored to the needs and desires of the residents. It is not hard to imagine a few service providers gaining a foothold in the building to install electronics that enable them to offer services, and just warehousing this access right while they seek to raise financing or await the time to offer services, while excluding other service providers because no space remains for the others. It is also not hard to imagine the taking of all available space in a building by one or more service providers who offer no cable TV or Internet access service. ARTICLE 52 enables

[13] SMATV services are completely unregulated other than signal leakage regulations. Similarly, franchise cable TV offerings are not rate regulated, except for the possibility of very limited basic service rate regulation that is permissible if the franchise authority overcomes the presumption that the cable provider is subject to effective competition. *In the Matter of Amendment to the Commission's Rules Concerning Effective Competition, Implementation of Section 111 of STELA Reauthorization Act*; Report and Order, 30 FCC Rcd 6574 (2015).

that outcome by providing that the definition of "communications services" for which access must be granted is any service the provider wants to offer.[14] Thus, a provider can say it wants access and will not provide cable or Internet access services.

For those who may doubt the above scenarios can happen, bear in mind that if one tenant says it wants a service of a provider, under ARTICLE 52 the provider has to be accommodated within the building. And there is nothing in ARTICLE 52 to stop a tenant from accepting consideration from the service provider in exchange for requesting the service. The market for tenancies in San Francisco is competitive and a building with substandard or no cable or Internet access services would be at a competitive disadvantage.

And while building space created for telecom can be taken under ARTICLE 52 against the interests of tenants and the building owner, ARTICLE 52 would even allow service providers to take space that is otherwise used or reserved for other purposes. Section 5201 says a building owner violates ARTICLE 52 by "refusing to allow a communications services provider to install the facilities and equipment necessary to provide communications services...." There is a list of acceptable reasons for refusing access in Section 5206. One of those enumerated reasons deals with the issue of space availability. Section 5206(b)(3) allows a refusal of access when the property owner "can show that physical limitations at the property *prohibit* the communications services provider from installing the facilities and equipment in existing space ...."[15] Stated otherwise, if the property owner does not have vacant and otherwise unreserved space available for a new service provider, ARTICLE 52 forces the property owner to divert already used or reserved space it would not otherwise divert to communications to make room for the new

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[14] The definition in Section 5200 states, in part, that: "Nothing in this definition is intended to limit the types of services that a communications services provider accessing a multiple occupancy building pursuant to this Article 52 may provide to occupants."

[15] Emphasis added.

service provider's equipment. And while Section 5206(b)(5)(D) allows the property owner to refuse access if this disruption affects services, this disruption must be to the very limited category of "essential services." Thus, ARTICLE 52 allows the taking of non-communications space with the outcome that amenities used to attract and retain residents may be eliminated, the quality of the tenant's experience is otherwise impaired, or the character, competitiveness or value of the building is diminished. None of these outcomes are a reason under ARTICLE 52 to withhold access to the service provider.

C. ARTICLE 52 Allows Service Providers to Disrupt Tenant–beneficial Bulk Services Arrangements

In addition to the above concerns, ARTICLE 52 allows a prospective service provider to disrupt discounted bulk service arrangements, even though the Commission found after a notice and comment proceeding in 2010 that "it is clear that [the bulk billing model] has significant pro-consumer effects."[16] Under ARTICLE 52, if a resident of a building wants a different service, and the apartment building owns or controls the wiring, then a previously unknown service provider can demand access to the wiring for that resident and the building owner can no longer require that the resident to pay a portion of the bulk service fee, thus shifting the costs to other residents and harming the value of these otherwise beneficial and consumer-friendly arrangements.[17]

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[16] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, FCC 10-35, MB Docket No. 07-51, at ¶28 (rel. Mar. 2, 2010)

[17] Section 5202 provides that the property owner cannot discriminate against the occupant who wants service from an alternative provider. The first draft of the ordinance limited the banned discrimination to discrimination "in rental or other charges...." The ordinance as enacted broadens the banned discrimination beyond rents and charges to discrimination "in any manner...."

V. ARTICLE 52 Creates an Uneven Playing Field that Makes It Risky for a Building Owner to Protect the Tenant's Interests Against Service Providers

Proponents of ARTICLE 52 will defend it by urging that it respects the building owner's interests by allowing "reasonable" access conditions and that this is a fair and balanced approach. But, as explained above, those "reasonable" conditions that are permissible must be "necessary" for the limited purposes of protecting the safety, functioning and appearance of the property and the convenience and well-being of the occupants. In short, if the condition is not the least restrictive means of accomplishing those purposes or appears to stray beyond those purposes, the building owner is in violation of ARTICLE 52 and open to sanctions. Moreover, the system of enforcement is anything but fair and balanced.

Under ARTICLE 52, the building owner is at tremendous risk of disproportionate penalties imposed by a reviewing local court that sees the necessity, reasonableness or scope of conditions on access sought by the building owner differently than the building owner. In that event, a decision on access conditions made in good faith by the building owner can be punished with an injunction striking the conditions, and an order of the court requiring the building owner to pay the telecom provider's attorneys' fees and to pay a $500 a day penalty.[18] There is no fine that may be assessed against a prospective service provider that unreasonably rejects any of the building owner's conditions to access and the building owner has no expectation of receiving an award of its attorneys' fees and costs if the apartment building successfully defeats the law suit.[19]

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[18] Attorneys' fees are shifted from the plaintiff to the defendant under Section 5211 and the civil penalties are assessed under Section 5212.

[19] This unilateral attorneys' fees shifting provision is contained in Section 5211. If the plaintiff obtains the injunction, the court may award the plaintiff its attorneys' fees and costs. Thus, if the plaintiff substantially prevails, the plaintiff's attorneys' fees and costs will be paid by the defendant. In stark contrast, the defendant building owner can only qualify for a discretionary consideration of an award of its attorneys' fees and costs if the court decides that the plaintiff's complaint is "frivolous," which is a very high standard that will be met rarely if ever. In this regard, the Restatement (Third) of the Law Governing Lawyers describes a claim as being "frivolous" when it is one "that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal will accept it." (Section 110, cmt. d). Under this standard, an unsuccessful claim is not frivolous just because it is unsuccessful. In fact, the belief by the lawyer that a particular claim is likely to fail still does not render

The unilateral attorneys' fees shifting requirement of ARTICLE 52 is unfair and "implicitly demonstrates the uneven bargaining strength of the parties ... as unilateral attorneys' fees clauses are often used to oppress weaker parties in litigation."[20]

ARTICLE 52, in effect, forces provider access to a building against reasonable building owner objections, thereby replacing the orderly, competitive, and consumer-responsive process for service provider access to apartment buildings and other multi-tenant environments, with a chaotic system for entering buildings that will tend to come at the sacrifice of fairly-priced, consumer-centric service. As the Commission has found,[21] building owners perform a valuable function in providing and making available amenities for tenants, a function that is displaced for communications services by ARTICLE 52's scheme that promotes neither quality, nor low price nor responsiveness to consumers. The ultimate fault of ARTICLE 52 is that it is based upon the false notion that the interests of communications services providers, no matter who they are or what services they provide, are aligned with those of tenants and these providers are better than building owners in deciding what services would best serve tenants' interests. ARTICLE 52 can be expected to harm the tenant as the consumer of communications services and should be preempted in favor of the existing scheme of building owner participation in the selection of service providers.

VI. ARTICLE 52 Serves No Legitimate Public Policy

In considering ARTICLE 52 from a policy standpoint, one is hard pressed to find a need for a regulation that would justify removing the building owner from the process of service

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it frivolous. American Bar Association, *Pre-suit Investigation and Pursuit of Frivolous Claims*, at 3. Available at: http://apps.americanbar.org/abastore/products/books/abstracts/5190471_chap1_abs.pdf.

[20] *Unilateral Attorney's Fees Clauses: A Proposal to Shift to the Golden Rule*, 61 Drake Law Review 85, 89 (2012). Available at: https://lawreviewdrake.files.wordpress.com/2015/06/lrvol61-1-bright.pdf.

[21] *Telecommunications Services Inside Wiring – Customer Premises Equipment*, CS Docket No. 95-184, FCC 03-9, at ¶ 11 (rel. Jan 29, 2003).

provider selection. Building owners strive to provide tenants with access to services that are of high quality and priced competitively; they have no interest in depriving tenants of cable, telephone and Internet access services they have comes to expect, or to allow these services to be inferior in quality or priced above the market.

That is what the FCC found when it last examined the MDU environment. NAA has substantiated that this conclusion remains valid today in San Francisco. For purposes of this proceeding, NAA conducted a survey of its members owning or managing apartment buildings in San Francisco, which demonstrates that there is no need for such disruptive local, non-expert regulation of the interstate communications marketplace. The results of this survey show existing robust competition for the provision of communications services to the tenant that is actively supported and developed by apartment building owners. Building owner participation in the process ensures that service providers offer tenant-responsive services. Each respondent to the survey was asked to describe the competitiveness of the San Francisco apartment rental market, and all described the state of competitiveness as extreme. All respondents said that cable and Internet access is very important to their tenants, with one respondent saying that:

> "It's paramount when we go to these communities and acquire or build them. It is one of the most important aspects of the community for the residents. It is becoming more and more important to have the highest internet speeds...."

Respondents said that the quality of the cable/Internet services in their apartment buildings is a direct reflection on the apartment building and impacts the building's competitive position in San Francisco. Indeed, competitive entry is not a problem. With one unusual exception,[22] the

[22] This respondent operates small buildings that are very old, generally in the range of 60 to 100 years old, which were not constructed in a manner conducive to adding communications cabling and in many cases historical properties. As a result, it is challenging from a return on investment perspective to wire these buildings. That said, this respondent stated that it is open to negotiating the terms of agreements with an additional cable/Internet providers and that "We actively do that."

respondents stated that 80% or more of their buildings are served by two cable/Internet providers, with one nationwide building owner stating that it has a policy of hosting two competitors at every site and another nationwide building owner saying that most if not all of its properties are two-provider properties. When asked if the respondent would host a second provider at a site served by one provider, the respondents said that they would, with responses such as "We're always open to negotiating access."

VII. Conclusion

ARTICLE 52 is a disruptive local interference with the functioning of the interstate information and telecommunications services marketplaces It violates the Inside Wiring Rules and the policy behind those rules, while taking away valuable and otherwise unavailable tenant protections and serving no legitimate public policy. It should be preempted.

Respectfully submitted,

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